IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 323 of 2004
With
CRIMINAL APPEAL No. 324 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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SINDHY ZALABHAI CHHAYABHAI

Versus

STATE OF GUJARAT

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Appearance :

MR SHAKTISINH GOHIL for Appellants

MR SP HASURKER APP for Respondent

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CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date : 13/07/2005

ORAL COMMON JUDGMENT

1. Both these Appeals are preferred against a judgment and order delivered by Additional Sessions Judge, Fast Track Court No.3, Patan, on 23rd of January, 2004, in Sessions Cases No. 638 of 2002 and 25 of 2003. The incident in question being same for both the sessions cases, learned Additional Sessions Judge disposed of both the above said sessions cases with aforesaid judgment and order. In fact, accused Sindhy Zalalbhai Chhayabhai and Sindhy (Rathod) Dodalbhai Sumarbhai were the accused of same crime, but accused Sindhy Zalalbhai Chhayabhai was arrested on 13th of March, 2003, and hence a supplementary charge sheet

was submitted against him and his Sessions Case was given as Sessions Case No. 25 of 2003, while accused Sindhy (Rathod) Dodalbhai Sumarbhai was arrested on14th of June 2002 and charge sheet was submitted against him and his Sessions Case was given Sessions Case No. 638 of 2002.

2. Both the accused were charged for the offences punishable under Sections 392, 397 and 114 of the Indian Penal Code and under Section 135 of the Bombay Police Act. The learned Trial Judge found both the accused guilty for the offences punishable under Sections 392, 397 and 114 of the Indian Penal Code and under Section 135 of the Bombay Police Act. Each of the accused was sentenced to undergo rigorous imprisonment of seven years and to pay fine of Rs. 500, and in default, to undergo simple imprisonment of three months for the offence punishable under Section 392 to read with Section 114 of the Indian Penal Code. Each of the accused was sentenced to undergo rigorous imprisonment of seven years and to pay fine of Rs. 500/-, in default to undergo simple imprisonment of three months for the offences punishable under Sections 397 to read with Section 114 of the Indian Penal Code. Each of the accused was sentenced to undergo imprisonment of one month for the offence punishable under Section 135 of the Bombay Police Act. The learned Trial Judge also directed that the sentences inflicted upon each of the accused shall run concurrently, and each of the accused shall be given set off for the period during which each of the accused was under trial prisoners. The learned Trial Judge did not pass any order in respect of muddamal because other absconded persons were yet to be arrested till the pronouncement of the judgment.

3. Against the above said judgment and order, accused Sindhy Zalalbhai Chhayabhai preferred Criminal Appeal No. 323 of 2004 while Sindhy (Rathod) Dodalbhai Sumarbhai preferred Criminal Appeal No. 324 of 2004. Both these appeals have arisen from the same judgment and order and hence are heard together.

4. Incident in question took place at about 4.15 am on 21st of May, 2002. Complainant Bhagwanbhai Amarsinh Solanki , residing at Ahmedabad, was doing job as a driver with NID. On the day of incident, complainant and his other relatives were travelling in one Ambassador car, bearing No. GJ-1-1774. They were going to attend marriage ceremony of a relative at village Govna. They reached near Village Sardhav at about 4.00 am and found a diversion on the said road. Near the diversion, there was a bump on the road. Therefore, the car was slowed down. At that very juncture, rear left tyre of the car was punctured and hence the car was stopped near the road. Complainant and his brother came out of the car and took spare wheel and jack from the boot of the car. They removed the punctured wheel for fixing a spare wheel. At that time, in Hindi somebody shouted from the filed adjoining the road that what had happened. The complainant stated that the car was punctured. Thereafter the persons who had inquired what had happened, started pelting stones and came nearer to the complainant and the car. Complainant was frightened and the persons who had come nearer, threatened the complainant and all the passengers of the car to sit tight, and directed them to hand over everything having with them. Those persons took out knife and threatened to cut them down. One of them put such knife at the throat of

wife of brother of the complainant and snatched a necklace from her neck. Complainant and his other relatives stated that they might not be beaten because they were prepared to give ornaments. Thereafter the ornaments like gold chains, rings, etc. were taken away by those persons and they also snatched two suit cases kept in the boot of the car. Thereafter said persons went away in the darkness in the field, and after 10 minutes, a police car was noticed by the complainant passing through the road, so he stopped the said car and informed about the incident. In said suit case, cash belonging to the complainant of Rs. 7,200/- was also taken away by those persons. According to the complainant, those persons were chatting in Hindi and were appearing young. Thereafter, Investigating Officer of Harij Police Station Tribhovanbhai Karsanbhai Patel was in the said police car, recorded the complaint of the complainant and informed Patan Police Control, and the said complaint was sent to Patan Police Station for registering offence, which was registered by PSO Satuji Nathuji Chavda, at about 8.15 a.m. Said P.I. Tribhovanbhai Karsanbhai Patel investigated the offence and as above said accused Sindhy (Rathod) Dodalbhai Sumarbhai was arrested on 14th of June, 2002, and a charge sheet was submitted against him. While the second accused Sindhy Zalalbhai Chhayabhai was arrested on 14th of March, 2003 and supplementary charge sheet was submitted against him.

5. On both the cases being committed to the Court of Sessions at Patan, vide Exh.4 in Sessions Case No. 638 of 2002, and vide Exh.1 in Sessions Case No. 25 of 2003. charges were framed against each of the accused, and on pleading not guilty to the charge, prosecution examined as many as 18 witness.

Complainant's witness

1. Anandba Pratapsinh Darbar	PW-7	Exh.21
2. Shanagarba Amarsinh Darbar	PW-8	Exh.22
3. Bhagwanji Amarsinh Solanki	PW-11	Exh.29
4. Vikramsinh Arjunsinh Solanki	PW-12	Exh.31
5. Natawarlal Mafatlal Soni	PW-13	Exh.33
6. Muralidhar Jaikishan Sindhy	PW-14	Exh.34
7. Narendra Prakashchandra Soni	PW-15	Exh.36
8. Manilal Punjabhai Pundiya	PW-10	Exh.25

Panch Witnesses

9. Narayanbhai Chandulal Pandya	PW-1	Exh.7
10.Vijaykumar Sonaji Thakore	PW-2	Exh.9
11.Kanjiji Chhaganji Vaghela	PW-3	Exh.10
12.Rajesh Jayantilal Joshi	PW-4	Exh.12
13.Veera Aalji Solanki	PW-5	Exh.13
14.Baldevji Gopalji Darbar	PW-6	Exh.19

Police Witnesses

15.Satuji Nathaji Chavda	PW-9	Exh.23
16.Tribhovanbhai Karsanbhai Patel	PW-16	Exh.38
17.Harishchandra Ratubha Jhala	PW-17	Exh.44
18.Lakhmanbhai Khimjibhai Chauhan	PW-18	Exh.47

The prosecution to prove its case also produced following documents on record.

1. Panchnama of Identification Parade - Exh.8
2. Panchnama of red shawl which did not belong to complainant – Exh.11
3. Panchnama of place of incident shown by Dodalbhai Sumarbhai - Exh. 14
4. Panchnama of place of incident – Exh.20
5. Depute order – Exh. 24.
6. List regarding identification parade – Exh. 26 and 39
7. List regarding identification parade – Exh. 27
8. Panchnama of identification parade of Zalal Chhaya – Exh.28
9. Complainant's complaint – Exh. 30
10. Certificate regarding weight of ornaments – Exh.35
11. Panchnama regarding ornaments recovered from goldsmith Natwarlal – Exh-37
12. Receipt for mudammal recovered from Natwarlal Mafatlal – Exh.40

6. The learned Trial Judge recorded further statements of each of the accused under Section 313 of the Cr.P.C. where the defense of both the accused was of total denial. After hearing both the sides, the learned Trial Judge delivered impugned judgment and order and hence both these Appeals.

7. As being Appellate court, it becomes the duty of this Court to look into

the evidence adduced in the case and arrive at an independent conclusion as to whether the evidence produced during trial can be relied upon or not, and whether the case against the appellants could be proved beyond all doubts during trial on the evidence adduced. The credibility of a witness has to be adjudged in drawing inference from proved and admitted facts emerging from the evidence of the prosecution. After undertaking independent scrutiny of the evidence, objective satisfaction has to be reached affirmatively that the case of prosecution was substantially true and that the guilt of the accused was proved beyond reasonable doubt during trial. Needless it is to say that the judicial approach in dealing with the case where an accused is charged of grave and serious offence has to be cautious, circumspect and careful. Before convicting the accused by the Trial Court and while upholding the conviction, this Court has to consider the matter carefully and examine all relevant material circumstances of the case. Therefore, it is necessary to appreciate the evidence adduced on record of the case in its entirety.

8. The evidence adduced by the prosecution can be classified in three categories. First victims and other witnesses, second panch witnesses and third police witnesses. It appears that the case of prosecution is mainly based upon the evidence of test identification parades held in respect of both the accused and recovery of muddamal - ornaments - golden chains, stated to have been sold by the accused to the goldsmith.

9. Considering first the evidence of panch witnesses, in all, the

prosecution examined six panch witnesses out of total 18 witnesses. Except PW-6 Baldevji Gopalji Darbar, Exh. 19, the panch of panchnama at Exh.20 about the Ambassador car, none of other five panchas supported the prosecution case and turned hostile. Panch Narayanbhai Chandubhai Pandya PW-1 is panch of panchnama Exh. 8 of test identification parade held by PW-10 Manilal Punjabhai Pundiya Exh.25. The said panchnama at Exh. 8 was drawn on 17th of June, 2002 by Executive Magistrate at 16.30 hours in the chamber of Executive Magistrate, Harij. It is the prosecution case in the said panchnama that, on that day, accused Sindhy (Rathod) Dodalbhai Sumarbhai was handed over to the Executive Magistrate for test identification parade and in presence of PW-1 Naryanbhai Chandubhai Pandya and PW-2 Vijaykumar Sonaji Thakore, both the panchas, complainant Bhaganbhai Amarsinh Solanki, identified accused Dodalbhai Sumarbhai, standing in between persons No.2 and No. 3. The accused was given opportunity to change his appearance, and according to his demand, one hand-kerchief was given to him, which he tied on his head, and thereafter he was identified by the complainant during test identification parade. However, both the above said panchas i.e. PW-1 Narayanbhai Chandubhai Pandya and PW-2 Vijaykumar Sonaji Thakore did not support the prosecution case.

10. So far as other panchas are concerned, PW-3 Kanjiji Chhaganji Vaghela is a panch of panchnama at Exh.11 by which one shawl was found near the scene of offence and complainant stated that said shawl did not belong to his. PW-3 Kanjiji Chhaganji Vaghela did not support the panchnama at Exh.11 and likewise PW-

4 second panch of that panchnama Rajeshkumar Jayantilal Joshi also did not support the prosecution case. PW-5 Exh. 13, Veerabhai Maljibhai Solanki was examined as panch of panchnama Exh. 14. The panchnama Exh.14 is in respect of scene of offence as shown by accused Dodalbhai Sumarbhai Sindhy. It is the prosecution case that in police custody, said accused willingly prepared to lead the police and panchas to the scene of offence and he led the police and panchas to the scene of offence. This panchnama is dated 17th of June, 2002. The preliminary panchnama was prepared at 11.00 am and thereafter the latter part of the panchnama at the scene of offence said to have been completed at 12.30 hours. PW-5 Veerabhai Maljibhai Solanki, Exh. 13, being panch of said panchnama, stated that he only signed the panchnama and said panchnama Exh.14 was never drawn in his presence. As stated above, Baldevji Gopalji Darbar, panch of Exh. 20 in respect of the Ambassador car, is examined at Exh. 19. He supported the said panchnama though he admitted that the complainant happened to be his nephew. Panchnama Exh. 14 was drawn on 17th of June, 2002 at 9.00 am and according to this panchnama, the status of the Ambassador car is mentioned as well as it was also found that near the field of the said road, two suit cases were lying and the clothes were thrown nearby. In presence of panchas, complainant identified the said suit cases to be his.

11. From the witnesses present at the time of incident as passengers of Ambassador car, four were examined by the prosecution. Bhaganbhai Amarsinh Solanki, complainant, is examined as PW-11 Exh. 29, who after describing the incident, as mentioned in the complaint Exh. 30, stated in his deposition that he was

called by the police for the test identification parade twice. Each time there were separate accused. He identified muddamal and corroborated the complaint filed by him at Exh. 30. In his examination in cross, in Sessions Case No. 638 of 2002, he stated that he did not recognize accused Dodalbhai Sumarbhai at the time of incident and he could not say whether the said accused was present at the time of incident. He stated that he identified Dodalbhai Sumarbhai on 17.6.2002 , but he saw the said accused in police station. He stated that he stayed half an hour in the police station and took tea with PSI. PSI introduced accused Dodalbhai to him. He admitted that had he not seen the accused in police station, he could not have identified accused Dodalbhai Sumarbhai during test identification parade. While during cross-examination in Sessions Case No. 25 of 2003, he stated that the car was driven by his cousin Vikramsinh, and he was sitting in the front seat. He admitted that it was dark at the scene of offence. He stated that in the incident there were in all three persons. He further stated that one truck passed through the road and, therefore, he identified the accused Zalalbhai Chhayabhai in the incident. He stated that he tried to stop the truck. Two out of three persons were snatching ornaments from his relatives while third person was standing little away. He admitted that he could not say when test identification parade of the accused Zalalbhai Chhayabhai was conducted. He had been to Harij Police Station. He denied that at that time accused Zalalbhai Chhayabhai was present in police station. He denied that accused Zalalbhai Chhayabhai was introduced by PSI to him. He further stated that when he went to the Executive Magistrate's office, the accused had come there. He reached at the office of Executive Magistrate at about 3.00 pm and after 30 minutes the test identification parade was

conducted. He denied that he did not identify the accused Zalalbhai Chhayabhai. He denied that he had seen the accused Zalalbhai because he was taken out from the hostage and was taken to the court on each date and therefore he stated falsely that he did not know the accused Zalalbhai.

12. The other eye witness Vikramsinh Arjunsinh Solanki is examined as PW-12 at Exh. 31. He stated that on account of bump on the road, he slowed down the car and found that the rear left tyre of the car got punctured. Therefore, he took the car on left side of the road and started to make preparation to change the punctured tyre after taking out the spare wheel from the boot of the car. At that time there was stone pelting from the adjoining field and someone came near and had shown knife. The said person directed us to resume our seats in the car. Therefore he was frightened. He stated that the complainant had tried to stop a truck. Thereafter, the persons who were pelting stones had robbed them of all ornaments and they also took away two suit cases from the car which were found from the field near to the road. He stated that the accused were chatting in Hindi. From female members, the accused robbed ornaments and accused also took away Rs. 2,200/- from him. He stated that there was dark at night and, therefore, he could not identify the accused at the time of incident. In cross-examination he stated that he saw in all three persons, but out of them, one had beard and the other had muffled his face.

13. The third eye witness Anandba Pratabsinh Darbar is examined as PW-7 at Ex.21. She stated that complainant happened to be the elder brother of her

husband. They were going to village Govna along with other relatives. At about 4.00 am when they reached near Village Sardhav, the car was punctured and was stopped near by road. At that time, three persons came from the adjoining field and they had demanded to hand over all the ornaments belonging to them. Therefore, they handed over ornaments to them including cash of Rs. 7,000/-. She did not identify those persons, but in cross-examination she stated that it was dark at the time of incident to the extent that even the persons standing nearby, could not be identified. She stated that she was frightened and this incident continued for about 25 minutes.

14. The fourth eye witness is examined as PW-8 Shanagarba Amarsinh Darbar at Exh. 22. She stated that complainant was her brother and incident took place on 21st of July, 2004. All were going to village Govna from Sidhpur in Ambassador car. Near village Sardhav, tyre of Ambassador car was got punctured and, therefore, the car was parked near the road. Three persons came and stated to hand over all the ornaments, so they handed over the ornaments to them. Police reached at the spot. The complaint was lodged by her brother and police also recorded her statement. In her examination in cross, she stated that there was darkness at the time of incident and she did not identify any of the accused.

15. So, this was the evidence of four witnesses present at the time of the incident.

16. PW-10 Manilal Pujabhai Pundiya is examined at Exh. 25 because he

conducted two test identification parades, one on 17th of June 2002 in respect of accused Dodalbhai Sumarbhai and second on 27th of March, 2003 in respect of accused Zalalbhai Chhayabhai. In his deposition he stated that on 17th of June 2002, in pursuance of the instructions received from the police, he conducted test identification parade in respect of Dodalbhai Sumarbhai. At about 16.45 hours police produced accused Dodalbhai Sumarbhai before him. He was made to sit in his chamber. Thereafter, dummy persons were called for performing test identification parade and they were made to stand in a lane and accused Dodalbhai Sumarbhai was instructed to take his place of choice in the said lane, and if so desired by him, he might change his appearance. This test identification parade was conducted in the presence of panchas. Thereafter, complainant was called and identified accused Dodalbhai Sumarbhai standing at No.3 in the lane in the presence of panchas. He further stated the he conducted second identification parade on 27th of March, 2003 upon instructions received from the police. He received yadi in this respect at 16.30 hours, which he produced on record at Exh.27. In the meantime, complainant reached at his office and he was instructed to sit in other room. Thereafter, two panchas and other persons performing test identification parade were called. They were instructed and sounded about test identification parade. The dummy persons were instructed to form a standing lane. Thereafter, accused Zalalbhai Chhayabhai was instructed to take his place amongst the persons standing in the lane and was allowed to change his appearance if so desired by him. Accused Zalalbhai Chhayabhai changed his shirt and stood between the persons standing at No. 4 and 5. Thereafter, the complainant was called and was asked to identify the accused. The complainant identified accused

Zalalbhai Chhayabhai standing between persons at Sl. No. 4 and 5. Thereafter again the accused Zalalbhai Chhayabhai was instructed to change his appearance if he so desired, and the complainant was called once again for identifying accused. This time accused took his place between persons standing at Sl. No. 2 and 3 and complainant second time identified accused Zalalbhai Chhayabhai. He produced both the panchnamas at Exh. 8 and 28. In his cross-examination he stated that he called panchas and other persons in his office at 16.45 hours. He stated that before accused was produced before him he had called panchas and other persons. He admitted that he called persons without seeing the accused. All the persons participated in the test identification parade wore pants and shirts. He admitted that the appearance of persons took part in the test identification parade was not noted by him. He stated that Police Station and Mamlatdar Office at Harij are situated in the same complex. He denied that he could see anything of the police station from his chamber. He denied that at the time of test identification parade IO was present. In his cross-examination in Sessions Case in Session Case No. 25 of 2003 for accused No.2 , he stated that when accused was produced in his chamber, the complainant was not present. After production of the accused, after 10minutes complainant reached to his office. The complainant was called by police. He took five minutes in calling panchas and other persons. He admitted that he called panchas and other person after the accused was produced before him. He denied that in the second panchnama the police staff was present. He denied that police had produced complainant and accused simultaneously in his chamber. This is the evidence of the Executive Magistrate.

17. Now in respect of recovery of muddamal of ornaments from PW-13 Natvarlal Mafatlal Soni Exh.33 is concerned, the evidence of three witnesses are required to be gone into. Those witnesses are PW-13 Natvarlal Mafatlal Soni, Exh.33, PW-14 Muralidhar Jaikishan Sindhy and PW-15 Narendra Prakashchandra Soni Exh. 36. It is the case of the prosecution that the Investigating Officer Tribhovanbhai Karsanbhai Patel recorded the statements of the accused and in that pursuance he recovered and seized muddamal from PW-13 Natawarlal Mafatlal Soni as said muddamal was sold by the accused to this witness. Deposition of Natwarlal is recorded at Exh.33, but he denied that any ornaments were sold to him by accused. He denied that he knew accused Dodalbhai Sumarbhai or the other accused and he denied that the police had recovered any muddamal of this case from his shop and that complainant was never present in his shop for the identification of the said muddamal of ornaments. So in all respects, he did not support the prosecution case that accused Dodalbhai Sumarbhai Sindhy and Zalabhai Chhayabhai had been to him and had given golden ornaments which were belonging to the complainant to him. He has been cross-examined by the prosecution. The next witness in this connection is PW-14 Muralidhar Jaikishan Sindhy is examined at Exh. 34. It is the prosecution case that on seizure of muddamal from PW-13 Natvarlal Mafatlal Soni, the same was weighed by this witness Muralidhar Jaikishan Sindhy in the presence of panchas. In his deposition at Exh. 34, witness Muralidhar Jaikishan Sindhy stated that he had never been to the shop of Natawarlal Mafatlal Soni, but he was called at Police Station and was asked to give certificate about weights of muddamal recovered which he gave. He also did not support the case of prosecution. He has been cross-examined by the prosecution and

certificate issued by him about weight of the muddamal is produced at Exh. 35. Third witness in this connection, Narendra Prakashchandra Soni is examined at Exh. 36. He is one of the panchas of panchnama at Exh. 37 by which the said muddamal was recovered by the Investigating Officer from the shop of Soni Natawarlal Mafatlal PW-13. In the said panchnama Exh. 37 which was drawn on 27th of June 2002 at 16.00 hours, it is the prosecution case that PW-13 Natvarlal Mafatlal Soni willingly stated before the panchas to deliver muddamal of this case and in the presence of panchas said Natawarlal Mafatlal Soni produced muddamal of the case which was seized by the police, which thereafter weighed by PW-14 Muralidhar Jaikishan Sindhy, as stated above, who has turned hostile. This panch witness PW-15 Narendra Prakashchandra Soni also in his deposition at Exh. 36 did not support the prosecution case and stated that he was called at Police Station to sign panchnama at Exh. 37 that he had never been to the shop of Natawarlal Mafatlal Soni. He has also been cross-examined by the prosecution and was confronted with panchnama Exh.37.

18. The remaining four witnesses are police witnesses. PW-9 Satuji Nathuji Chavda is examined at Exh. 23. In his deposition he stated that he was in-charge of Harij Police Station on 21st of May, 2002 from 8.00 am to 14.00 hours and at about 8.00 am the Investigating Officer PSI Mr. Tribhovanbhai Karshanbhai Patel forwarded a complaint recorded by him of the complainant for registering the same. He registered the complaint and handed over the investigation to PSI Shri Thibhovanbhai Karshanbhai Patel. He produced on record the complaint. Thereafter the Investigating Officer, the then PSI of Harij Police Station Mr. Tribhovanbhai

Karsanbhai Patel is examined at Exh. 38. He stated that on early morning of 21st of May, 2002, he received telephone instruction that near village Sardhav, some persons have stopped a car and attempted to rob passengers of the said car and therefore when he received this information from police station, with police staff he proceeded to village Sardhav in police vehicle and found one Ambassador car having a puncture in a tyre. Some persons were standing near the Ambassador car and the complainant first orally narrated the incident and thereafter he recorded the complaint. He intimated Patan Police Control and called for the dog squad and FSL persons. After entrustment of investigation, he executed the panchnama of scene of offence and recorded the statements of witnesses. On 14th of June, 2002 LCB PSI H.R. Jhala arrested the accused Dodalbhai Sumarbhai Sindhy at 21.15 hours and, therefore Dodalbhai Sumarbhai Sindhy was arrested by him in this crime as well. He had recorded the statement of the accused Dodalbhai Sumarbhai Sindhy and with that statement the accused was handed over to Harij Police Station. He executed a panchnama of recovery of muddamal at Sidhpur in the presence of panchas. Thereafter, test identification parade was arranged by him of accused Dodalbhai Sumarbhai Sindhi. He got weighed the muddamal recovered through goldsmith Muralidhar Jaikishan Son. The said muddamal was identified to be the muddamal which was robbed during the incident. Thereafter the accused had shown the place of offence and he executed a panchnama in the presence of panchas in this respect. He filed a charge sheet against this accused because other accused were not found. In his cross-examination in Sessions Case No. 638 of 2002, he stated that all the papers by which the accused Dodalbhai Sumarbhai Sindhy arrested by LCB PI was handed over

to him. He denied that accused Dodalbhai Sumarbhai did not sell any muddamal to Soni Natawarlal Mafatlal. He denied that nothing was recovered from Soni Natawarlal Mafatlal. He denied that no such panchnama was drawn by him. He denied other allegations. In cross-examination in Sessions Case No. 25 of 2003, he stated that how the telephone vardhi about the incident was received in Harij Police Station could not be deposed by him without seeing the record. He denied that complainant and witnesses did not state before him that the accused put knife on the neck of son of the complainant. He admitted that during investigation of accused Dodalbhai Sumarbhai it was not revealed that in this crime accused Zalabhai Chhayabhai was also involved. This was all he stated in his evidence.

19. PW-17 at Exh. 44 Harishchandra Ratubha Jhala is examined and at the relevant time he was serving as PSI in LCB Branch of Patan District. He stated that he came to know that the accused who was involved in the present crime had been to Patan. So he was apprehended and his statement was recorded. In his statement he stated that muddamal of the said robbery was sold by him to Soni Natawarlal Mafatlal, Sidhpur, and therefore with the accused he went to the shop of Soni Natawarlal Mafatlal and recorded the statement of the said witness. Thereafter the accused was arrested and was handed over to the Investigating Officer, PSI, T.K. Patel of Harij Police Station. In his cross-examination, he stated that he did not depose falsely that accused Dodalbhai Sumarbhai stated before him that Dodalbhai had sold muddamal to Soni Natawarlal Mafatlal. He admitted that during his inquiry he did not recover anything from the said Soni Natawarlal Mafatlal. Third witness in this respect is

Lakhmanbhai Khimjibhai Chauhan PW-18 who is examined at Exh.47. He is second Investigating Officer of this crime. He stated that on 22nd of March, 2003, through wireless message he came to know that the accused Zalalbhai Chhayabhai is arrested in Crime Register No. 134/2000 registered before Sidhpur Police Station. It was revealed that the said accused Zalalbhai Chhayabhai was also involved in the present crime. Therefore, in pursuance of a transfer warrant, he was arrested in this crime on 24th of March, 2003. On 25th of March, 2003, Zalalbhai Chhayabhai willingly had shown the place of offence for which a panchnama was drawn by him. He managed to arrange test identification parade of this accused and he was identified by complainant Bhagwanbhai Amarsinh Solanki. Thereafter he submitted supplementary charge sheet against this accused in the court. In his examination in cross he stated that nothing was recovered from this accused during investigation. He further stated that he did not obtain remand of this accused. He denied that he introduced accused with the complainant before the test identification parade. He denied that before submitting the charge sheet against this accused, he did not read the charge sheet papers in respect of accused Dodalbhai Sumarbhai. He denied that accused Zalabhai Chhayabhai did not show the place of offence. He denied that there was no evidence against this accused even though he submitted charge sheet against him.

20. This was all the evidence of prosecution including above said documentary evidence produced by the prosecution.

21. From the above evidence, the learned Trial Judge came to the

conclusion that in cases of robbery and dacoity, there may not be direct evidence and the involvement of the accused may not be proved directly, but through circumstantial evidence, the charges against such accused can be proved. In this case, according to the learned Trial Judge, it is proved that mudammal which was robbed was recovered during investigation from PW-13 Natvarlal Mafatlal Soni. Complainant has identified such mudammal to be the mudammal which was robbed in the incident. The complainant also identified both the accused in test identification parade and test identification parade would not be invalidated only because complainant said that he had seen the accused in police station before test identification parade. The reason which the Trial Judge advanced was that the complainant had seen both the accused during the incident and both the accused were identified by him during test identification parade. On relying a decision of this Court in the matter of VINUGIRI MOTIGIRI v. STATE OF GUJARAT, as reported in 2002 (1) GLR 702, learned Trial Judge came to the conclusion that in respect of identification parade and in respect of discovery panchnama of seizure of muddamal, the evidence of the Investigating Officer is found credit worthy and though the panchas are turned hostile, the crime of the accused is proved through the Investigating Officers, three in number, examined by the prosecution. In the evidence of three Investigating Officers, there is no contradiction or inconsistency and, therefore, on strength of this evidence, the learned Trial Judge came to the conclusion that offences charged against both the accused were proved beyond all reasonable doubts and he convicted and sentenced the accused, as aforesaid.

22. Learned Advocate Mr.Shaktisinh Gohil on behalf of the appellants in both the appeals urged that the conclusion of the Trial Judge is erroneous because neither discovery is proved nor the evidence of identification of the accused by the complainant through test identification parade is weakest kind of evidence especially when all the panchas have not supported the prosecution case. The learned Advocate for the appellants further argued that the way in which the incident is narrated as described by PW-7 Anandba Pratapsinh Darbar and PW-8 Shanagarba Amarsinh Darbar, it could not have been possible for the complainant to identify properly any of the accused at the time of incident. It is further urged that the evidence of seizure of mudammal as well, is also not trustworthy because said witness PW-13 Natawarlal Mafatlal Soni has turned hostile even panchnama on recovery of mudammal is not proved by the prosecution. It was submitted that PW-14 Muralidhar Jaikishan Sindhy alleged to have given certificate about weights of the ornaments has also turned hostile and no weightage can be given to this witness. It is stated that only on the strength of the evidence of the Investigating Officers, conviction could not have been based because this is not a case wherein in absence of other evidence the case could have been said to have been proved through the evidence of the Investigating Officers. Though there are discrepancies in the evidence of the officers as to how recovery of mudammal was made and the arrest of the accused and no reliance entirely can be placed on such evidence. It is, therefore, urged that both the appeals be allowed and the judgment and order of the Trial Court be reversed and accused be acquitted.

23. Learned APP Mr. S.P. Hasurker for the State in both the Appeals

argued vehemently that there is no scope of interference in the appeals as the conclusion arrived at by the Trial Court is proper. It is urged that though in case almost all the panchas have turned hostile except PW-6 Baldevji Gopalji Darbar Exh.19, reliance can be placed on the evidence of the Investigating Officer and Executive Magistrate who conducted both test identification parades. Learned APP Mr. Hasurker further urged that it is proved beyond reasonable doubt that the incident, as stated in the complaint, has taken place and that is evident from panchnama of scene of offence and its panch PW-6 Baldevji Gopalji Darbar, who has fully supported the prosecution case. In the evidence of this witness everything is corroborated what is stated by the complainant and other victim witnesses. In the first identification parade, complainant identified accused Dodalbhai Sumarbhai, while in second identification parade, the complainant identified accused Zalalbhai Chhayabhai. The panchas of these two panchnamas have not supported the prosecution case, but there is no reason to disbelieve the evidence of the Executive Magistrate Manilal Punjabhai Pundiya, PW-10 in this respect. When the incident is proved, the link of the accused through this evidence is also proved that both the accused participated in the crime. The Trial Judge rightly relied upon test identification parades which was properly held by concerned Executive Magistrate, who deposed before the court. Learned APP Mr. Hasurker further stated that still more evidence clinching in nature is of recovery of articles i.e. Ornaments from PW-13 Natawarlal Mafatlal Soni. It is urged that true that PW-13 Natawarlal Mafatlal Soni, PW-14 Muralidhar Jaikishan Sindhi and PW-15 Narendra Prakashchandra Soni, a panch of panchnama at Exh. 37, have not supported the prosecution case in respect

of seizure of mudammal articles, but in the evidence of the Investigating Officer i.e. Tribhovanbhai Karsanbhai Patel – PW-16, it is proved that the said articles which were robbed in the incident were seized from PW-13 Natawarlal Mafatlal Soni, and the same was identified by complainant which is evident from the evidence of the complainant. There is no contradiction or inconsistency in the evidence of PW-16 first Investigating Officer in respect of seizure of mudammal and therefore this seizure is a fact discovered in pursuance of the information of the accused and is admissible and could be relied upon even if panchas of said panchnama and PW-13 Natawarlal Mafatlal Soni have turned hostile. It is urged that the Investigating Officer PW-16 is further supported by P'W-17 Harishchandra Ratubha Jhala, who arrested accused Dodalbhai Sumarbhai, when he was working as PSI, LCB Branch of Patan District. He recorded the statement of the accused and in pursuance of that, recovery is effected. So, from the evidence of PW-16 Mr. Tribhovanbhai Karsanbhai Patel and PW-17 Mr. Harishchandra Ratubha Jhala, it is proved that the stolen articles were sold by accused to PW-13 Natwarlal Mafatlal Soni, to whom the accused had sold such articles. It is stated that the Trial Judge has rightly relied a decision of this Court in the matter of Vinugiri Motigiri (supra) where this court ruled that even in absence of panchnama under Section 27 of the Evidence Act, prosecution may prove the fact discovered upon the information of the accused through the Investigating agency if the same is otherwise reliable. Therefore, it is urged that in view of the reasoning given by learned Trial Judge, there is clinching evidence to convict the present accused in the crime and there is no scope for interference in the judgment and order impugned in these appeals.

24. Having heard learned counsels and having re-appreciated the evidence and exercising threadbare scrutiny of the evidence, it is found that two types of evidence against the accused are required to be discussed to decide this appeal. Firstly, the evidence of seizure of muddamal articles alleged to have been stolen during the incident and secondly the evidence of test identification parade.

25. Discussing the first evidence against the accused about recovery of articles from PW-13 Natawarlal Mafatlal Soni is concerned, it is to be decided first whether this seizure of mudammal, can be construed as "fact discovered" in pursuance of the information given by the accused. The mandate of Section 27 of the Evidence Act is clear that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. It is noteworthy that in clear term Section 27 of the Evidence Act mandates that a fact discovered through an information supplied by the accused in his disclosure statement is a relevant fact and that is only admissible in the evidence. "Fact discovered" means something new discovered or recovered from the accused, which was not within the knowledge of the police before recording the disclosure statement of the accused. The nature of such provision in shape of exception provided by Sec. 27 is explained by the Apex Court in the matter of ANTER SINGH vs. STATE OF GUJARAT, as reported in AIR 2004 SC 2865. In paras 14 and 16, the Apex Court observed as under

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"14. The expression "provided that" together with the phrase "whether it amounts to a confession or not" show that the section is in the nature of an exception to the preceding provisions particularly Sections 25 and 26. It is not necessary in this case to consider if this Section qualifies, to any extent, Section-24, also. It will be seen that the first condition necessary for bringing this Section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word "distinctly" means "directly", "indubitably", "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly", relates "to the fact thereby discovered" and is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance

attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered."

16.The various requirements of the Section can be summed up as follows :

(1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.

(2)The fact must have been discovered.

(3)The discovery must have been in consequence of some information received from the accused and not by accused's own act.

(4)The persons giving the information must be accused of any offence.

(5)He must be in the custody of a police officer.

(6)The discovery of a fact in consequence of information received from an accused in custody must be deposed to.

(7)Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible."

26. From the above, one of the requirements to cover case under Section 27 of the Evidence Act is the fact must have been discovered and not recovered. In this respect, when we scan the evidence, it has become clear that accused Dodalbhai

Sumarbhai was arrested by PW-17 Harishchandra Ratubha Jhala, PSI of LCB, and he recorded the statement of accused Dodalbhai Sumarbhai when he found that the said articles of mudammal were sold by Dodalbhai Sumarbhai to PW-13 Natawarlal Mafatlal Soni. His evidence further establishes that he also recorded the statements of PW-13 Natawarlal Mafatlal Soni. He further states that thereafter the accused Dodalbhai Sumarbhai and the papers were handed over to the Investigating Officer Mr. T.K. Patel, PSI of Harij Police Station. This evidence undoubtedly lead to establish that witness Harishchandra Ratubha Jhala informed about everything to the Investigating Officer and also handed over him the papers. Pertinent it is to note here that the Investigating Officer who conducted the search knew when accused Dodalbhai Sumarbhai was handed over to him that accused had sold said mudammal articles to PW-13 Natvarlal Mafatlal Soni. It is also pertinent to note here that PW-17 Harishchandra Ratubha Jhala in his deposition ie in examination in cross stated that during his inquiry he did not seize any articles from the goldsmith. In this exercise, it is necessary to evaluate the evidence of the Investigating Officer Mr. Tribhovanbhai Karshanbhai Patel, who is examined as PW-16. He distinctly stated that on accused Dodalbhai Sumarbhai being entrusted to him, he recorded the statement of the accused and a panchnama of mudammal was drawn at Sidhpur where the accused had sold such mudammal. Now, it becomes clear that even before Investigating Officer recorded the statement of the accused, he knew by virtue of the statement recorded by Mr. Harishchandra Ratubha Jhala, PSI, LCB, that the accused had sold mudammal articles to one Natvarlal Mafatlal Soni of Sidhpur. Therefore, it is not the case that some information was received from person accused of offence in the custody of

police officer, which distinctly relate to discovery of anything. Therefore, the panchnama drawn by the Investigating Officer in respect of mudammal i.e. Exh. 37 cannot by any stretch of reasoning be termed as an evidence of discovery within the meaning of Section 27 of the Evidence Act. The provisions of Section 27 of the Evidence Act, which is in the nature of exception, demands that the prosecution must prove firstly the information received from the accused of an offence and discovery in pursuance of such information. While going through panchnama at Exh. 37, irrespective of the fact that, both the panchas have not supported the said panchnama, it is stated that not the accused but PW-13 Natwarlal Mafatlal Soni willingly was prepared to hand over mudammal to the Police which was sold to him by the accused. So, this panchnama appears not to be at the instance of the accused, but at the instance of the said Goldsmith. Very important aspect is, PW-16 - Mr. T.K. Patel nor Mr. Jhala, distinctly stated in their deposition that what clear and distinct information they had received from accused Dodalbhai. PW-16 makes omnibus statement that he recorded the statement of accused Dodalbhai and made panchnama at Sidhpur for seizure of mudammal where accused had sold this mudammal. Therefore, since Investigating Officer failed to prove this seizure strictly according to Section 27 of the Evidence Act as per the decision of the Apex Court in Anter Singh (supra), no reliance can be placed on this evidence. Further PW-13 Natwarlal Mafatlal Soni did not support the prosecution case. Meaning thereby that the link that the accused sold said mudammal to PW-13 Natawarlal Mafatlal Soni is not proved beyond reasonable doubt. As discussed above, certainly this is not the case wherein Section-27 of the Evidence Act would be applicable and, therefore, the reliance placed by the learned

Trial Judge on a decision of the Division Bench of this Court in the matter of Vinugiri Motigiri vs. State of Gujarat (supra) is misplaced. In the said decision, it is amply made it clear by this court that the Legislative idea in insisting on such searches to be made in the presence of two independent panchas is to ensure the safety to all such articles meddled with and to protect the rights of the persons entitled thereto. But recovery of an object pursuant to the information supplied by an accused in custody is different from the searching endeavour envisaged in Chapter VII of the Code. True it is that, it is nowhere a requirement of law that the information envisaged by Section-27 of the Evidence Act and discovery on strength of such information must be proved by two panchas and, therefore, it is always necessary to look to the evidence of Investigating Officer in those circumstances. But before that, the prosecution must prove the case beyond doubt in respect of Section 27 of the Evidence Act. Going through the deposition of PW-17 Harishchandra Ratubha Jhala, when he states that he arrested accused Dodalbhai Sumarbhai and received the information that he sold the mudammal articles to PW-13 and though he visited PW-13 and recorded the statement of the accused and PW-13, he did not recover muddamal. While PW-16 Tribhovanbhai Karsanbhai Patel, Investigating Officer, amply states that he recorded the statements of the accused and the accused had sold mudammal at Sidhpur, which was recovered by him in the presence of panchas. Beyond this , there is nothing in his deposition at Exh. 38 to prove a case under Section 27 of the Evidence Act. As aforesaid, on the contrary, as per the prosecution case itself it was PW-13 Natawarlal Mafatlal Soni, who volunteered himself to offer mudammal which was seized by the police. This part of the case could not be proved on account of PW-13 Natawarlal

Mafatlal Soni and because the panchas did support this prosecution case. Therefore, the view taken by the learned Trial Judge that what was recovered from PW-13 was in pursuance of Section 27 of the Indian Evidence Act is erroneous and so far as this mudammal is concerned, no connection through the evidence recorded and as discussed above, can be established between mudammal and the accused. Therefore, so far as the evidence of recovery of mudammal is concerned, the prosecution has failed to establish a link between the accused and the muddamal and the said evidence is not useful to conclude that the accused were guilty of the crime.

27. The second circumstance which appears from the evidence of prosecution is in respect of test identification parades of both the accused. Needless it is to say that the identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their investigation to establish the guilt of the accused is progressing in correct directions. The use of such test identification parade is as a corroborative piece of evidence of the statements made by the witnesses in the court. It must also be noted that the test identification parades have found their place in investigation process because if the accused is not known to the witnesses previously, the opportunity can be afforded to the witness to identify suspects to be a person participating in crime. The whole idea therefore behind this logical measures is that when witnesses who claim to have seen the culprits at the time of occurrence of the crime are to identify them from the middest of the other persons without any aid or without resorting to any source. The main purpose for such test identification is to evaluate and test the

veracity of the claim of the witnesses and to test their memories based upon first impression which might have gathered by witnesses during the commission of crime. The test identification parade like other evidence is subjected to the scrutiny and appreciation of evidence by the court. It must also be noted that the veracity of the test identification parade rests upon many factors, like memory of a human being, which varies from one to another, capacity to imbibe the actual scenario happening before their eyes, opportunity to the witnesses to gather imprints in the circumstances of the commission of crime and above all proximity of time between the test identification parade and actual commission of crime. Since each human being possessing differential capacity to watch and store the incident in memory, the appreciation of such evidence of test identification parade always depends upon the facts and circumstances of each case.

28. The present case as has been disclosed by the evidence, two identification parades were conducted by the Investigating Agency. The first identification parade was held by the Magistrate, as aforesaid, on 17th of June, 2002, before the Executive Magistrate, Harij. It is the prosecution case that in the said test identification parade, PW-11 Bhaganji Amarsinh Solanki identified accused Dodalbhai Sumarbhai Sindhy. Now, though both the panchas of the said panchnama, Exh. 8 drawn by the Executive Magistrate, have turned hostile, but reliance can be placed on the deposition of the Executive Magistrate, PW-10 Manilal Punjabhai Pundiya when he deposed that accused Dodalbhai Sumarbhai Sindhy was identified by complainant Bhaganbhai Amarsinh Solanki, no fault could be found in the

deposition of the Executive Magistrate, but even though this evidence of test identification parade in the shape of panchnama at Exh. 8 fall short of proving the case against accused Dodalbhai Sumarbhai Sindhy. As aforesaid, the evidence of test identification parade is subjected to the scrutiny of the appreciation of evidence by the court, and in this respect it is utmost necessary to appreciate the evidence of complainant PW-11 Bhaganbhai Amarsinh Solanki. In his deposition in cross-examination in Session Case No.638 of 2002, in unequivocal terms, the complainant admits that he did not recognize accused Dodalbhai during the occurrence of incident. Not only that, he also further admits that on 17th of June, 2002, the day on which the test identification parade was conducted, he had seen accused Dodalbhai Sumarbhai Sindhy in the police station. He has further admitted that he had stayed in the police station for half an hour and had taken tea with PSI and there accused Dodalbhai Sumarbhai was introduced by PSI to him. He still states further that had he not seen the accused Dodalbhai Sumarbhai in the police station, he could not have identified him during test identification parade. This evidence of complainant completely destroys the evidence of identification parade held by the Executive Magistrate on 17th of June, 2002. The evidence of Executive Magistrate is beyond rapproach, but the circumstances in which the complainant identified the accused Dodalbhai Sumarbhai, frustrated the very purpose and object of conducting the test identification parade. It is noted again that the very object and purpose of conducting the test identification parade is to test the memory of witness to identify the accused who is not previously known or seen by him. The deposition of complainant discloses that before conducting the identification parade, the accused Dodalbhai Sumarbhai is

introduced to him at the police station and he further states that on strength of that only he could identify accused Dodalbhai in test identification parade, which was conducted on 17th of June, 2002. It is also noteworthy that the complainant in clear terms admits that even during the occurrence of the incident, he could not recognize accused Dodalbhai Sumarbhai Sindhy. Thus, appreciating the evidence of this identification parade, credibility of the prosecution case is demolished and through this evidence, the prosecution failed to prove that accused Dodalbhai Sumarbhai participated in the crime and that the evidence of the test identification parade adduced by the prosecution appears to be a futile exercise to bring the guilt of the accused at home.

29. The third incriminating evidence which the prosecution has adduced is again in respect of the identification of other accused Zalalbhai Chhayabhai. This identification parade, as per the evidence of PW-10 Manilal Punjabhai Pundiya, was conducted on 27th of March, 2003. It is pertinent to note that the incident in question occurred on 21st of May, 2002, but the accused appellant Zalalbhai Chhayabhai could be arrested only on 24th of March, 2003 and, therefore, the second identification parade in respect of this accused could be conducted only on 27th of March, 2003. The Executive Magistrate deposed that on that day, as aforesaid, he called panchas and afforded opportunity to accused Zalalbhai Chhayabhai to disguise himself and to find place of his choice in row of standing persons. In the presence of panchas complainant Bhagwanbhai Amarsinh Solanki identified the accused Zalalbhai Chhayabhai twice. It must be observed that

though the only panch made of the said panchnama i.e. PW-1 Narayanbhai Chandulal Pandya is examined out of two but he has not supported the prosecution case, but the evidence of test identification parade is evaluated with reference to the deposition of Executive Magistrate, PW-10 Manilal Punjabhai Pundiya. Again, as above said, the evidence of test identification parade is subjected to close scrutiny by the court because like any other evidence, the court must find out the credibility of the evidence, be it the evidence of test identification parade. True it is that, the evidence of Executive Magistrate, PW-10 is beyond rapproach, but the fact of identifying the accused Zalalbhai Chhayabhai twice by the complainant requires scrutiny. It must be remembered that the identification parade in respect of this accused Zalalbhai Chhayabhai is conducted after 10 months of the incident. Necessary it is, therefore to examine the memory of the complainant and his opportunity to notice accused Zalalbhai Chhayabhai participating in crime and capacity to store such imprints for about 10 months to identify the accused Zalalbhai Chhayabhai in such test identification parade. It is, therefore, necessary to go through the evidence of three important witnesses examined by the prosecution and these witnesses are relatives of complainant, two of them were sitting in the Ambassador car at the time of the incident and one brother of the complainant was out of the car. Those witnesses are PW-7 Anandba Pratapsinh Darbar, PW-8 Shanagarba Amarsinh Darbar and PW-12 Vikramsinh Arjunsinh Solanki. PW-7 Anandba Pratapsinh Darbar, as noted above, in her deposition in cross stated that it was very dark at the time of incident. She stated that it was so dark that it was not possible to identify any person standing nearby. While PW-8

Shanagarba Amarsinh Darbar also stated in her deposition that it was very dark and she could not identify the persons committed crime. PW-12 Vikramsinh Arjunsinh Solanki has stated that he was driving vehicle and on noticing that rear wheel being punctured, he came down of the car and in the process of checking tyre, the incident took place. He categorically stated that on account of darkness, he could not identify the persons who committed the crime. In his examination in cross he states that one of the accused had having beard and the other two had muffled their faces. So, from the evidence of these three witnesses and appreciating these evidence, circumstances at the time of commission of crime are established and from these circumstances, now it is required to be found out that what was the opportunity to the complainant to recognize accused Zalalbhai Chhayabhai. In this respect, while turning to the deposition of the complainant, he stated that out of two accused, he identified one person, and that person was accused Zalalbhai Chhayabhai, to whom he identified in the court. He stated in his deposition that the incident took place before about 10 months. In his examination in cross in Sessions Case No. 25 of 2003, he admitted that the darkness was deep and as such it was impossible to recognize any person, but one truck passed through the road and, therefore he identified accused Zalalbhai Chhayabhai. So, this was the opportunity for the complainant to memories accused Zalalbhai Chhayabhai to identify him after ten months. From the evidence of above said three witnesses and from the evidence of this witness, it becomes clear that it was deep dark at night and it was impossible to identify any person, but for identifying accused Zalalbhai Chhayabhai, the complainant says that a truck passed through

and he noticed Zalalbhai Chhayabhai, probably he meant that in the headlight of the truck, Zalalbhai Chhayabhai was identified by him. Having gone through the evidence of complainant as a whole, it becomes clear that the complainant had very brief opportunity to notice accused Zalabhai Chhayabhai even in the headlight of passing truck. The sharpness of memory of this witness is not reflected anywhere in his deposition to justify his claim that he could easily identify accused Zalalbhai Chhayabhai in test identification parade twice to whom he had noticed for a brief moments on a dark night at highway through the headlight of a passing truck. True it is that, memory of persons varies from person to person. The manner in which the complainant has deposed, it becomes clear that firstly there was very meager opportunity for the complainant to identify the accused committing the crime and secondly even if in the headlight of a passing truck the accused Zalalbhai Chhayabhai was noticed by the complainant, even then, it was impossible for him to identify accused Zalalbhai Chhayabhai after 10 months. The very important aspect is material discrepancy in the evidence of complainant PW-11 Bhagwanji Amarsinh Solanki. In his complaint at Exh. 30, the complainant stated that one of the accused was identified in the headlight of the passing truck, the evidence is required to be appreciated from this view also. The complainant in his cross-examination also admitted that the fact that he identified one accused through the headlight of a passing truck was not mentioned by him in his complainant at Exh.30. It is necessary here to note that the case of the complainant in complaint is, there were three persons who were thin and tall and all about 30 to 35 years of age and they were chatting in Hindi language. One of them had a pant and shirt

while other two had put on vests and pants. Meaning thereby that the original prosecution case through this complaint was, he noticed three accused and recognized them. While in his deposition, complainant changes his version to the extent that out of the accused he identified only one accused and that is accused Zalalbhai Chhayabhai during the incident. Noteworthy it is that nowhere in complaint it is the case of complainant that one accused was identified by him through the headlight of passing truck on the road. Therefore so far as the opportunity of the witness to notice the accused and memory to identify the accused after 10 months is concerned, the case of prosecution is destroyed again on account of the evidence of complainant Bhaganbhai Amarsinh Solanki and the evidence of test identification parade held on 23rd of March, 2003 is also not credit worthy to connect the accused with the crime.

30. Now only evidence against the accused is panchnama of showing place of offence by accused Dodalbhai, which is adduced at Exh.11. It is the case of prosecution that in police custody accused Dodalbhai expressed his willingness to show the place of offence to the police. A preliminary panchnama was drawn and according to prosecution case accused Dodalbhai showed the place of offence in the presence of panchas. Only panch examined in this respect is PW-5 Vira Alji Solanki, who has not supported the prosecution case. IO Mr. T.K. Patel also does not refer this panchnama in his deposition and he only deposed to the extent that he prepared a panchnama of place of offence where accused had committed crime. This evidence is neither here nor there and not at all useful to bring home the crime

committed by the accused.

31. The learned Trial Judge therefore erred on placing reliance upon the evidence of recovery of mudammal and the test identification parade evidence as tendered by the prosecution. The evidence of prosecution therefore falls short to establish the guilt of the accused appellants beyond all doubts. On re-appreciation of evidence, it clearly appears that both the appellants are entitled to benefit of reasonable doubt in view of the above discussion.

32. In the result, both the Appeals i.e. Appeal No. 323 of 2004 and Appeal No. 324 of 2005 are allowed. The judgment and order delivered by Additional Sessions Judge, Fast Track Court No.3, Patan, on 23rd of January, 2004, in Sessions Case Nos. 638 of 2002 and 25 of 2003 impugned in both these Appeals is set aside and appellant Sindhy Zalalbhai Chhayabhai in Criminal Appeal No. 323 of 2004 and appellant Sindhy (Rathod) Dodalbhai Sumarbhai in Criminal Appeal No. 324 of 2004 are acquitted of the charges under Sections 392, 397 and 114 of the Indian Penal Code and under Section 135 of the Bombay Police Act level led against them. Fine if paid by any of the accused be refunded to him. The order of muddamal passed by the Trial Court is not interfered with in these Appeals. Appellant Sindhy (Rathod) Dodalbhai Sumarbhai of Criminal Appeal No. 324 of 2004 is on bail in pursuance of the order dated

2.4.2004 of this Court. Hence his bond stand cancelled. While appellant Sindhy Zalalbhai Chhayabhai in Criminal Appeal No. 323 of 2004 is under custody and it is directed that appellant – Sindhy Zalalbhai Chhayabhai be set at liberty forthwith if he is not required to be detained in custody for any purpose. Direct Service permitted.

(J.R. VORA, J.)

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